be different from that relating to cod liver oil in any other type of container.

Mr. Chelliah contends that a prescribed test is sufficiently set out in those pages of the Pharmacopoeia and can be derived from a study of those pages.

I must confess that, at the least, I am in doubt as to whether the distinction between the tests applicable to cod liver oil in capsules and to cod liver oil in other forms of container is a valid one. In any event no evidence on the point has been submitted. That being so, on the evidence available before me on the record, I am unable to say that there is no prescribed method within the meaning of section 9(2).

The analyst having failed to state that he has followed the prescribed method or that there was no prescribed method, it seems to me that one cannot quarrel with the decision of the learned Magistrate that the prosecution had failed to comply with section 9; this not seeming to be a matter in which the prosecution can avail themselves of a presumption.

The appeal must therefore be dismissed and the acquittal affirmed.

Appeal dismissed.

Solicitors: *Drew & Napier.*

Re LOW KUAN MENG

[R. Cr. J. (Ong J.) May 5, 1962]

[K.L. — Criminal Revision No. 6 of 1962]

Criminal Law and Procedure — Preliminary inquiry — Order of acquittal — Jurisdiction of Magistrate — Criminal Procedure Code (Cap. 6) Ch. XVII.

The accused was provisionally charged with attempted murder under section 307 of the Penal Code. A preliminary inquiry was directed to be held before a Magistrate, and in due course, when it was to begin, the prosecution officer informed the Magistrate that, on instructions of the Deputy Public Prosecutor the charge against the accused was withdrawn. Thereupon the Magistrate made an order that "the accused is acquitted and discharged."

Held: the order of acquittal was manifestly wrong. A preliminary inquiry is not a trial, and at its conclusion there is no delivery of judgment. In making an order of acquittal the Magistrate was pronouncing a judgment, and he was purporting to do so even in a matter which he had clearly no jurisdiction to try.

Order of Magistrate varied, and order purporting to acquit the accused struck out.

Cases referred to:—

(1) *Public Prosecutor* v. *Mary Shim* [1961] M.L.J. 314.

CRIMINAL REVISION.

Ong J.: This matter came up for revision upon a petition by the Public Prosecutor that the Magistrate, before whom a preliminary inquiry was to have been held under Chapter XVII of the Criminal Procedure Code, had no jurisdiction to make an order of acquittal.

The accused was charged provisionally with attempted murder, an offence under section 307 of the Penal Code. A preliminary enquiry was directed to be held before a Magistrate, and in due course, when it was due to begin, on January 2, 1962, the prosecuting officer informed the Magistrate that, on instructions of the Deputy Public Prosecutor the charge against the accused was withdrawn. Thereupon the learned Magistrate made an order that "the accused is acquitted and discharged".

The order of acquittal was manifestly wrong. A preliminary inquiry is not a trial, and at its conclusion there is no delivery of judgment. In making an order of acquittal the learned Magistrate was pronouncing a judgment, and he was purporting to do so even in a matter which he had clearly no jurisdiction to try. The provisions of section 140 are quite clear. "Discharge" is not synonymous with "acquittal". The recent judgment of Adams J. in *Public Prosecutor* v. *Mary Shim* (1) makes further comment by me superfluous.

The order of the learned Magistrate is accordingly varied, and the order purporting to acquit the accused is struck out.

Order accordingly.

NATHA SINGH v. SYED ABDUL RAHMAN & ANOR.

[A.C.J. (Hepworth J.) May 7, 1962]

[Penang — Civil Appeal No. 1 of 1962]

Money and Moneylending — Promissory note in the English language — Not attested in accordance with s.27, Moneylenders Ordinance, 1951.

Contract — No plea of illegality — Whether court can intervene.

A promissory note written in the English language and not attested by of the persons specified in section 27 of the Moneylenders Ordinance, 1951 (as is required if the borrower is a person not understanding the written language on the note) is legal on the face of it. It would only be illegal if the borrowers (respondents) did not understand the English language. As there was nothing to indicate that they (respondents) did not understand the English language, it could not be said that the contract *ex-facie* showed illegality. As the respondents had not filed a defence and were absent at the trial, there was no question of an admission being made or evidence being given from which the promissory note's illegality clearly appeared.

Unless a defendant raises the defence of the illegality of a contract on the pleadings then he cannot rely upon it and, except where the contract is on the face of it illegal or its illegality is brought to the notice of the court, even the court has no right to intervene.

Cases referred to:—

(1) *Lipton* v. *Powell* [1921] 2 K.B. 51, 58.

(2) *North Western Salt Co.* v. *Electrolytic Alkali Co.* [1914] A.C. 461.

CIVIL APPEAL.

Jag-Jit Singh for the appellant.

Respondents absent.

Hepworth J.: The appellant, who is a licensed moneylender, issued a summons in the Magistrate's Court, Penang, claiming from the respondents the sum of $100 lent on a promissory note together with 4½ months' interest thereon at the rate of 18% per annum. The learned Magistrate dismissed the moneylender's claim although the defendants were absent and had not filed their defence when the case was called on for trial. The appellant appealed.

The grounds upon which the learned Magistrate dismissed the appellant's claim was that a perusal of the promissory note concerned revealed that it was not attested in accordance with section 27 of the Moneylenders Ordinance, 1951, in that it was a promissory note written in the English language and it was not attested by any of the persons specified in that section as is required if the borrower is a person not understanding the written language on such note. The learned Magistrate took the view that if the respondents understood the written language of the note then the appellant should have pleaded this fact. This fact was not pleaded and accordingly the appellant's claim must fail because the promissory note was void.

It is necessary to consider whether the objection taken to the promissory note by the learned Magistrate could properly be taken by him. Where an action is brought upon a contract and the point is not taken by the defendant that the contract is illegal there are two cases in which the Judge may intervene and refuse to enforce the contract. These are clearly set out by Lush J. in a judgment of the Divisional Court in *Lipton* v. *Powell* [1], the subject matter of which was a moneylending transaction. The learned Judge said:—

> "One of these cases is that in which the contract *ex facie* shows illegality. Many instances of actions on contracts which are plainly illegal are to be found in the reports. In a case of that kind the Court is entitled and indeed bound to intervene and refuse to enforce the contract, because 'No Court ought to enforce an illegal contract . . . if the illegality is duly brought to the notice of the Court'; *per* Lindley L.J. in *Scott* v. *Brown, Doering, McNab & Co.* ([1892] 2 Q.B. 724, 728), adopted by Cozens-Hardy M.R. in *In re Robinson's Settlement* ([1912] 1 Ch. 717, 725).
>
> The other case in which the judge may refuse to enforce the contract is that in which, although *ex facie* the contract is legal, yet in the course of the proceedings an admission is made or evidence is given by which its illegality clearly appears. If, for example, in an action like the present the plaintiff were to admit that he was unregistered, or the defendant were to give evidence that the plaintiff was unregistered, the illegality would be brought to the notice of the Court, and the Court would refuse to enforce the contract just as if the illegality had appeared upon the face of the contract.
>
> In a case coming within either of those two classes of cases the Court is apprised of the fact that it is being asked to enforce an illegal contract, and it may and ought to refuse to do so."

The promissory note with which we are concerned was legal on the face of it. It would only be illegal if the borrowers did not understand the English language. There was nothing to indicate that they did not understand the English language and accordingly it could not be said that the contract *ex facie* showed illegality. (As a matter of fact perhaps no more than passing interest a letter received in the High Court Registry from the respondents makes it abundantly clear that in fact they could both read and write the English language with fluency).

Secondly, as the respondents had not filed a defence and were absent when the case was called on for trial there was no question of an admission being made or evidence being given from which the promissory note's illegality clearly appeared. It was accordingly not open to the learned Magistrate to take the objection himself which he did. As Lord Haldane L.C. said in *North Western Salt Co.* v. *Electrolytic Alkali Co.* [2]:—

> "My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality."

It is clear from these cases that unless a defendant raises the defence of the illegality of the contract on the pleadings then he cannot rely upon it and, except where the contract is on the face of it illegal or its illegality is brought to the notice of the Court, even the Court has no right to intervene.

I accordingly allowed the appeal, set aside the judgment of the learned Magistrate and ordered the deposit paid into Court by the appellant to be paid back to him. As the appellant did not ask for costs I made no order as to costs.

Appeal allowed.

THE ASIA INSURANCE CO. LTD. v. CHAN WING & SONS REALTY CO. LTD.

[C.A. (Thomson C.J., Hill and Good JJ.A.)
May 17, 1962]

[K.L. — F.M. Civil Appeal No. 37 of 1961]

Nuisance — Vibration by piling operations — Structural damage — Old building — Measure of damages — Difference between money value of building before and after damage.

This was an appeal from the decision of Ong J. ([1962] M.L.J. 40) on the question of the assessment of damages. In allowing the appeal the Court of Appeal,

Held: the value of the premises is the improved value of the land at the relevant time, that is the value of the